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STUDENT NOTES

DRAFTING DISPUTE RESOLUTION CLAUSES FOR WESTERN INVESTMENT AND JOINT VENTURES IN EASTERN EUROPE

Mary Theresa Kaloupek *

INTRODUCTION

The markets of the formerly Communist countries in Eastern Europe provide numerous investment and marketing opportunities for Western companies and individuals. In the past two years, the nations of Eastern Europe¹ have experienced dramatic increases in the amount of foreign investment and the number of joint ventures between their citizens and Western investors.² As early as 1988, the Hungarian government recognized the potential benefits of increased foreign investment and amended its law to encourage such investment.³ The government of Yugoslavia⁴ followed suit in 1989, the Czech and

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1. For the purposes of discussion, "Eastern Europe" will refer to Bulgaria, the Czech and Slovak Federated Republic [hereinafter C.S.F.R.], Hungary, Poland, Romania, and Yugoslavia. The footnotes will include information regarding the laws of the Commonwealth of Independent States, Estonia, Latvia, Lithuania, and Albania where possible and appropriate. This Note cannot attempt to predict the future of investment law and dispute resolution law in the Commonwealth of Independent States and therefore will not consider the laws of any of the nations which have emerged from the former Soviet Union in the main text. See *Agreements Establishing the Commonwealth of Independent States*, Dec. 8 - Dec. 21, 1991, translated in 31 I.L.M. 138 (1992).

During the course of the research and writing of this Note, Yugoslavia was in a state of civil war. On May 22, 1992 the United Nations General Assembly admitted Slovenia, Croatia and Bosnia-Herzegovina as independent Member States. Dan Oberdorfer, *U.S. Places Sanctions on Serbia; Recognition Refused; Consulates Closed; Violence Denounced*, WASH. POST, May 23, 1992, at A1. The C.S.F.R. is planning a more peaceful dissolution. Viera Langerova, *Czech, Slovak Leaders Agree to Split*, DET. FREE PRESS, June 20, 1992, at A6. While this Note contains discussion of Yugoslavian and Czechoslovakian law, the reader must be aware of the unstable nature of such law. Discussion of these arbitration and foreign investment laws remains relevant because the emerging states will need to consider arbitration and investment laws soon after their governments have stabilized in order to remain competitive with their neighboring states for foreign capital investment.

2. *U.N. Reports Growth in Foreign Investment in Eastern Europe, Cites Difficulties*, Daily Report for Executives (BNA) A-3 (Aug. 13, 1991).

3. Amended Act No. XXIV of 1988 on Foreign Investment in Hungary, MAGYAR KÖZLÖNY No. 69/1988, at 1710 (Hung.) [hereinafter Law on Foreign Investment in Hungary], translated in 2 CENTRAL AND EASTERN EUROPEAN LEGAL MATERIALS (Vratislav Pechota ed., Rel. 1, June 1990) [hereinafter CEELM].

4. Law on Foreign Investments, Dec. 31 1988, SLUŽBENI LIST No. 77/1988, at 1023 (Yugo.), translated in 28 I.L.M. 1543 (1989).

Slovak Federated Republic [C.S.F.R.]⁵ in 1990, and Bulgaria,⁶ Poland,⁷ and Romania⁸ in 1991.⁹

Whenever a Western investor is negotiating a contract, particularly one with a foreign party or in a foreign country, the investor's attorney must consider the dispute resolution provisions of the agreement before closing the deal. As Jeffrey Hertzfeld states:

Two basic legal preconditions for the success of a joint venture enterprise anywhere in the world are, first of all, clarity in the law governing the rights and obligations of the investors and the operations of the companies in which they invest and, secondly, the availability of effective and mutually satisfactory techniques for settlement of disputes which may arise from time to time in the context of long-term joint business operations.¹⁰

5. The Enterprise with Foreign Property Participation Act, April 19, 1990 (C.S.F.R.), *translated in* 1 CEELM, *supra* note 3 (Rel. 1, June 1990). Albania also liberalized its investment laws in 1990. Decree on the Economic Activity of Enterprises with Participation of Foreign Capital in the Republic of Albania, Decree 7407/1990, July 31, 1990, as amended by Decree 31/1991, Sept. 5, 1991, *reprinted in* 1 CEELM, *supra* note 3 (Rel. 8, Apr. 1992). The new decrees allowed investment of foreign capital for the first time. John Lloyd, *Albania Sets Out to Lure Foreign Capital, Decrees on Investment Mark Break with the Past*, FINANCIAL TIMES, Aug. 2, 1990, at 2.

6. Law on Foreign Investments, May 16, 1991, DÖRZHAVEN VESTNIK No. 47/1990 (Bulg.), *translated in* 1 CEELM, *supra* note 3 (Rel. 6, Sept. 1991). This law amended the Enterprises Law of 1989, which had several provisions relating to foreign investment. Decree-Law No. 56 on Economic Activity, Jan. 13, 1989, DÖRZHAVEN VESTNIK No. 4/1991 (Bulg.), *translated in* 1 CEELM, *supra* note 3 (Rel. 6, Sept. 1991) [hereinafter Law on Economic Activity].

7. Law on Companies with Foreign Participation, June 14, 1991, DZIENNIK USTAW No. 60/1991 (Pol.), at 253, *translated in* 2 CEELM, *supra* note 3 (Rel. 7, Sept. 1991). The Polish government first liberalized its investment law in 1988. Law on Economic Activity with the Participation of Foreign Parties, December 23, 1988, DZIENNIK USTAW No. 41/1988, item at 325 (Pol.), *translated in* 28 I.L.M. 1518 (1989). The 1988 law was amended in 1989 by Law No. 442, Dec. 28, 1989 and then replaced by the 1991 law.

8. Law Concerning the Status of Foreign Investments, March 29, 1991, Law No. 35/1991 (Rom.), *translated in* 3 CEELM, *supra* note 3 (Rel. 5, July 1991).

9. Other recently enacted laws liberalizing foreign investment include: Foreign Investment Law, March 23, 1990, 30 I.L.M. 263 (1991) (Mong.); Foreign Investments Act, Dec. 28, 1990, GOVERNMENT GAZETTE No.129/1990, at 1, *reprinted in*, 31 I.L.M. 205 (1992) (Namib.); Law on Foreign Investment, Dec. 29, 1987, with Amendments and Additions, June 30, 1990, 30 I.L.M. 930 (1991) (Vietnam); National Investment (Promotion and Protection) Act, June 19, 1990, GAZETTE OF THE UNITED REPUBLIC OF TANZANIA No.26/1990, Acts Supplement No.3, *reprinted in* 30 I.L.M. 890 (1991).

On December 10, 1990, the Supreme Soviet issued new foreign investment legislation. Fundamentals of Legislation on Investment Activity in the U.S.S.R., Dec. 10, 1990, VEDOMOSTI SSSR No.51/1990, at 1343, *translated in* 30 I.L.M. 913, 919 (1991). The new republics have not yet indicated the extent to which they will adopt the principles expressed in that act. Estonia passed a foreign investment law in 1991. Foreign Investment Law, Sept. 11, 1991, RAHVA HAAL, Sept. 17, 1991 (Estonia), *translated in* 2 CEELM, *supra* note 3 (Rel. 8, Apr. 1992). Lithuania has not only established operation of enterprises, Lithuanian Law on Enterprises, May 22, 1990, *translated in* 2 CEELM, *supra* note 3 (Rel. 7, Dec. 1991), and joint stock companies, Law on Joint Stock Companies, July 30, 1990 (Lith.), *translated in* 2 CEELM, *supra* note 3 (Rel. 7, Dec. 1991), but is also encouraging foreign investment, Law on Foreign Investments in the Republic of Lithuania, Dec. 29, 1990, *translated in* 2 CEELM, *supra* note 3 (Rel. 7, Dec. 1991).

10. Jeffrey M. Hertzfeld, *Applicable Law and Dispute Settlement in Soviet Joint Ventures*, 3 ICSID REV.—FOREIGN INVESTMENT L.J. 249 (1988).

Therefore, it is advisable to include a carefully drafted arbitration clause in every contract. Arbitration agreements or other dispute resolution provisions are especially critical in foreign investment in Eastern Europe or joint ventures with Eastern European countries or enterprises. Until the people of these emerging market economies establish stable governments, any investment in or venture with any of these countries may be subject to risk from a variety of factors, including rapidly developing laws and economic systems. In the event of a dispute arising from an uncontrollable factor, an investor must have a resolution mechanism in place, grounded in the law existing at the time of the investment.

The more general benefits of arbitration clauses have been discussed extensively,¹¹ and will not be the subject of this Note. While parties have the option, under some regimes, to submit their dispute to arbitration after it arises, potential investors should be aware that once a misunderstanding occurs, reaching any agreement relating to arbitration may be impossible. The arbitration agreement should cover such vital issues as the location and language of the arbitration, the number of arbitrators and the means of their appointment, the choice of law governing the substance of the dispute, and the rules which will govern the arbitration.¹²

The parties may deal with a number of these issues by deciding to submit the dispute to either institutional or ad hoc arbitration. In institutional arbitration the parties submit the dispute to an independent institution, such as the International Centre for the Settlement of Investment Disputes (ICSID) or the Court of Arbitration at the International Chamber of Commerce. The institution will appoint arbitrators and provide default rules for the proceeding—for a fee.¹³ Ad hoc arbitration occurs when the parties arrange all of the details of the arbitration themselves. While this type of arbitration may save the parties administrative expenses, it may also lead to complications should the parties fail to anticipate any potential conflict concerning the proceed-

11. *E.g.*, HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 6 (1989); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 4 (1986); SULLIVAN & CROMWELL, AN OVERVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION 3-6 (1989).

12. For a detailed discussion of the strategies involved in drafting an arbitration clause, see Whitmore Gray, *Drafting the Dispute Resolution Clause*, in COMMERCIAL ARBITRATION FOR THE 1990's 140-64 (Richard J. Medalie ed., 1991).

13. The costs of ICSID arbitration include a U.S. \$100 registration fee, a fee of U.S. \$250 per day for the secretary assigned to the tribunal, payment to the arbitrators of 600 SDR per day spent on the arbitration in addition to the costs of the arbitrators', travel expenses for the secretary, and the expenses of interpreters, reporters and rental space. INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID BASIC DOCUMENTS, schedule preceding p. 3 (1985).

ing in the arbitration agreement or should they prove unable to agree on the composition of the arbitral panel.

Two common dispute resolution provisions are those which provide for "home and home" arbitration and those which provide for arbitration in a neutral country. In a home and home arrangement, the aggrieved party must go to the other party's home country to conduct the arbitration. This arrangement gives the respondent the advantage in both convenience and experience before the relevant tribunal. On the other hand, if the parties are amenable, arbitration before a neutral body or ad hoc arbitration in a neutral State is likely to inconvenience both parties equally and to be free from any concerns regarding national bias which would inhere to the respondent in a home and home arrangement.

This Note discusses issues the practitioner should consider in drafting a dispute resolution provision for a client investing in one of the newly democratizing countries. Part I will discuss arbitration law in Eastern Europe; the dispute resolution provisions in the various foreign investment laws; the applicable national law; and each nation's enforcement procedures for arbitral awards issued in other nations. Part II reviews the dispute resolution provisions in various bilateral and multilateral treaties relating to foreign investment including the Convention on the Settlement of Investment Disputes (ICSID Convention)¹⁴ and the informal agreements between the American Arbitration Association (AAA) and the chambers of commerce of Hungary,¹⁵ Poland,¹⁶ and the C.S.F.R..¹⁷

I. ARBITRATION LAW AND PRACTICE IN EASTERN EUROPEAN STATES

A. *Chamber of Commerce Systems and General Arbitration Law*

International arbitrations in formerly socialist nations traditionally proceeded through arbitration courts administered by the chambers of commerce of each government. The Council for Mutual Economic

14. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, *reprinted in* ICSID BASIC DOCUMENTS 7 (1985) [hereinafter ICSID Convention]. The ICSID Convention also appears at 60 AM. J. INT'L L. 892 (1966), and at 4 I.L.M. 532 (1965).

15. American Arbitration Association - Hungarian Chamber of Commerce, Memorandum of Agreement, Sept. 7, 1984, *reprinted in* ARB. J., Mar. 1985, at 36 [hereinafter AAA - Hung. Memorandum of Agreement].

16. Tripartite Agreement, Mar. 15, 1988, U.S.-Pol.-Aus., *reprinted in* 14 Y.B. COM. ARB. 284 (1989) [hereinafter AAA-Pol.-Aus. Tripartite Agreement].

17. Tripartite Agreement, March 29, 1989, U.S.-C.S.F.R.-Aus., *reprinted in* 15 Y.B. COM. ARB. 186 (1990) [hereinafter AAA-C.S.F.R.-Aus. Tripartite Agreement].

Assistance (C.M.E.A.)¹⁸ exerted strong influence over the expanding utilization of these courts. The Moscow Convention of May 26, 1972 committed the member nations to arbitrate all commercial disputes before an appropriate arbitral institution if the parties were from different member countries, and if the dispute arose from a contractual relationship which had been concluded within the C.M.E.A. framework.¹⁹ A large majority of the arbitrations before these chamber of commerce arbitration courts occurred in conjunction with mandatory arbitration under the Moscow Convention.²⁰

In 1974, the Executive Committee of the C.M.E.A. adopted uniform rules of procedure for arbitration before the courts in the chambers of commerce of all member nations.²¹ These uniform rules did not endeavor to unify all procedures, but they did ensure equal treatment of litigants before every court and streamlined certain judicial mechanisms. Furthermore, these regulations applied only to arbitrations between members of the C.M.E.A.²²

With the exception of Yugoslavia, all the States of Eastern Europe have retained some sort of institutional arbitration associated with their respective Chambers of Commerce. Each arbitral court has its own rules of procedure, although some allow the parties to designate other rules. While parties may now agree voluntarily to institutional arbitration before these bodies, a Western investor faced with the prospect of arbitrating in Eastern Europe may prefer the flexibility of ad hoc arbitration. All of the Eastern European States have laws governing ad hoc arbitration, either within or distinct from their codes of civil procedure. Choosing ad hoc arbitration avoids any influence by the government of the host nation and in most instances allows the parties to specify the details of the proceeding, including language, place, number of arbitrators, and governing rules. Still, ad hoc arbitration, though always an option under the law, was rarely employed under communism, and arbitrators in Eastern Europe may remain

18. The Council of Mutual Economic Assistance (C.M.E.A.), or COMECON, consisted of Bulgaria, Cuba, the C.S.F.R., East Germany, Hungary, Mongolia, Poland, Romania, and the Soviet Union. Yugoslavia was never a member.

19. Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic, Scientific and Technological Cooperation, May 26, 1972, 890 U.N.T.S. 167, translated in 13 I.L.M. 5 (1972). See also Heinz Strobach, *General Introduction*, 1 Y.B. COM. ARB. 4, 6 (1976).

20. See, e.g., Zhivko Stalev, *Bulgarian People's Republic*, in 1 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION SUPP. 12, Bulgarian P.R. - 1 (Albert Jan Van Den Berg ed., Jan. 1991) [hereinafter INT'L HANDBOOK ON COM. ARB.]; Svetozar Hanák, *Czechoslovakia*, in 1 INT'L HANDBOOK ON COM. ARB. SUPP. 5, Czechoslovakia - 1-2 (May 1986).

21. Uniform Rules of Procedure, reprinted in 1 Y.B. COM. ARB. 147 (1976).

22. Strobach, *supra* note 19, at 10.

somewhat skeptical about its utility.²³

Poland, Romania, and Yugoslavia have no specific arbitration laws. The laws governing ad hoc arbitrations derive from the States' codes of civil procedure.²⁴ In Poland, the Code of Civil Procedure requires that an arbitration clause must be in writing.²⁵ Polish doctrine holds that an arbitration clause is severable from the remainder of the contract.²⁶ The Polish rules allow foreigners to serve as arbitrators and to represent clients before the arbitral panel.²⁷ If the parties do not specify rules to govern the arbitration, the tribunal will conduct the arbitration as it deems appropriate.²⁸

The sections of the Romanian Code of Civil Procedure relating to arbitration are silent on several critical issues. The relevant code sections do not have any language requiring a written arbitration agreement, or guiding the parties on the procedural rules of the arbitration.²⁹ Non-citizens may not serve as arbitrators, although they may represent clients in institutional arbitration before the Arbitration Commission. In contrast, foreigners may serve on ad hoc panels.³⁰

The Yugoslavian Constitution provides that its citizens may agree to conciliation or arbitration.³¹ Yugoslavia requires that the arbitration agreement be in writing and allows the agreement to be severable from the contract at issue so that the panel may rule both on the validity of the contract and on whether the dispute is subject to arbitration.³² Its code permits foreigners to serve as arbitrators and counsel.

23. See Hanák, *supra* note 20, at 2.

24. Tadeusz Szurski & Andrzej Wiśniewski, *Polish People's Republic*, in 2 INT'L HANDBOOK ON COM. ARB. SUPP. 7, *supra* note 20, Polish People's Republic - 1 (Apr. 1987) (Code of Civil Procedure §§ 695 - 715, 1147, 1151 - 53); Tudor Popescu, *Socialist Republic of Romania*, in 2 INT'L HANDBOOK ON COM. ARB. SUPP. 10, *supra* note 20, Romania - 1 (June 1989) (Code of Civil Procedure §§ 340 - 375); Aleksander Goldštajn, *Yugoslavia*, in 3 INT'L HANDBOOK ON COM. ARB. SUPP. 4, *supra* note 20, Yugoslavia - 1 (Nov. 1985) (Code of Civil Procedure §§ 469 - 87).

25. Polish Code of Civil Procedure, DZIENNIK USTAW No. 43/1964, at 296, art. 698, *translated in* 2 INT'L HANDBOOK ON COM. ARB. SUPP. 4, *supra* note 20, Polish People's Republic: Annex I - 1 (Nov. 1987).

26. Szurski & Wiśniewski, *supra* note 24, at Polish People's Republic - 8-9.

27. *Id.* at Polish People's Republic - 15; Polish Code of Civil Procedure, *supra* note 25, art. 699.

28. Polish Code of Civil Procedure, *supra* note 25, art. 705.

29. Romanian Code of Civil Procedure, *translated in* 2 INT'L HANDBOOK ON COM. ARB. SUPP. 10, *supra* note 20, Romania: Annex I - 1 (June 1989).

30. *Id.* art. 342(2); Popescu, *supra* note 24, Romania - 6.

31. YUGO. CONST. (1974) art. 224. This principle has not been amended despite substantial changes to the Yugoslavian Constitution over the past five years. See Gisbert H. Flanz, *Yugoslavia Supplement 1986-91*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustien & Gisbert H. Flanz eds., Supp. May 1991).

32. Yugoslavian Code of Civil Procedure, art. 470, *translated in* 3 INT'L HANDBOOK ON COM. ARB. SUPP. 3, *supra* note 20, Yugoslavia: Annex I - 1 (Jan. 1985). The practitioner

The parties may choose any rules to govern the arbitration, and the arbitrators have discretion to run the arbitration as they see fit if the parties do not designate rules.³³

The C.S.F.R. passed the Act Relating to Arbitration in International Trade and to Enforcement of Awards on December 18, 1963 to "enable the participants in international trade to have their disputes settled in a speedy and smooth way which meets all professional requirements."³⁴ The Act represents the first broad-based international arbitration law adopted in a socialist country. It requires that the arbitration agreement be written and allows it to be severable from the main contract.³⁵ Non-citizens are permitted to act as arbitrators and participate as counsel in the arbitration.³⁶ When resolving the dispute before an institution, the parties are presumed to adopt the rules of the institution which they designate to hear the arbitration, unless they specify otherwise.³⁷ If the parties to an ad hoc arbitration do not specify arbitration rules, the panel must "fix the way of the proceedings."³⁸

The most dramatic event in Eastern European arbitration law occurred in August 1988, when Bulgaria enacted a new Law on International Commercial Arbitration which adopted the United Nations Committee on International Trade Law (UNCITRAL) model law, with some amendments, to govern international arbitrations in Bulgaria.³⁹ UNCITRAL adopted its model law on June 21, 1985 to promote harmonization of domestic arbitration law and procedure and to enhance international arbitration.⁴⁰ The General Assembly recom-

should be aware that if the arbitral panel must rule upon its own competence, its decision may be reviewed by a relevant court. Goldstajn, *supra* note 24, Yugoslavia - 5.

33. Yugoslavian Code of Civil Procedure, *supra* note 32, art. 478.

34. Act Relating to Arbitration in International Trade and to Enforcement of Awards, Act No. 98/1963, § 1 (C.S.F.R.), translated in 1 INT'L HANDBOOK ON COM. ARB. SUPP. 5, *supra* note 20, Czechoslovakia: Annex I - 1, § 1 (May 1986) [hereinafter Act Relating to Arbitration].

35. *Id.* §§ 4, 3(1).

36. *Id.* § 5(2); Hanák, *supra* note 20, Czechoslovakia - 24.

37. Act Relating to Arbitration, *supra* note 34, § 28(1).

38. *Id.* § 10(1).

39. Law on International Commercial Arbitration, Aug. 5, 1988, DÖRZHAVEN VESTNIK No. 60/1988 (Bulg.), translated in 1 INT'L HANDBOOK ON COM. ARB. SUPP. 12, *supra* note 20, Bulgarian P.R.: Annex I - 1 (Jan. 1991) [hereinafter LICA].

40. UNCITRAL Model Law on International Commercial Arbitration, Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, U.N. GAOR, 40th Sess., Supp. No. 17, para. 332 and Annex I, U.N. Doc. A/40/17 (1985) reprinted in 3 INT'L HANDBOOK ON COM. ARB. SUPP. 7, *supra* note 20, UNCITRAL Model Law - 1 (Apr. 1987) [hereinafter UNCITRAL Model Law].

For an in-depth discussion of the *travaux préparatoires* of the model law, see HOLTZMANN & NEUHAUS, *supra* note 11. See also Aron Broches, *Commentary on the UNCITRAL Model Law*, 3 INT'L HANDBOOK ON COM. ARB. SUPP. 11, *supra* note 20, *Commentary on the UNCITRAL Model Law* - 1 (Jan. 1990).

mended that "all States give due consideration to the Model Law . . . in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration."⁴¹ Hungary also has adopted a draft arbitration law based on the UNCITRAL model.⁴²

The Bulgarian law tracks the UNCITRAL model in several important respects. Both laws require written arbitration agreements.⁴³ Neither law specifically allows foreign counsel to practice in arbitral proceedings, but both permit citizens of any country to serve as arbitrators.⁴⁴ The laws advise arbitral panels to rule on their own jurisdiction and provide for severability of the arbitration clause from the contract.⁴⁵ Under both laws, the parties may specify the applicable rules of procedure or, if they fail to specify rules, the tribunal may proceed as it sees fit.⁴⁶ Following adoption of the new arbitration law the Bulgarian government promulgated rules based on the UNCITRAL model rules. Under these new rules, the arbitration court at the Bulgarian Chamber of Commerce and Industry will act as appointing authority for arbitrators in ad hoc arbitrations.⁴⁷

B. *Dispute Settlement Provisions in State Joint Venture and Foreign Investment Laws*

All East European States have recently enacted or amended their foreign investment or joint venture laws to make investment in their nations desirable. The stated purpose of the Hungarian law is typical: "to increase international economic cooperation, promote direct participation of foreign capital in the Hungarian economy, increase the technical development of the Hungarian economy and ensure a non-discriminatory national treatment for foreign investors."⁴⁸ The liberalized laws are now more predictable and allow investors to export

41. G. A. Res. 72, U.N. GAOR, 40th Sess., Supp. No. 53, at 308, U.N. Doc. A/40/53 (Dec. 11, 1985).

42. As this document is only a draft, arbitrations in Hungary continue to proceed under the rules of the Arbitration Court of the Hungarian Chamber of Commerce. Eva Horvath, *Arbitration in Hungary*, PRIVAT PROFIT (Sept. 1991). The rules of procedure of the Arbitration Court were amended in 1989 and are now based upon the UNCITRAL rules. Rules of Procedure for the Court of Arbitration attached to the Hungarian Chamber of Commerce, *translated in* 16 Y.B. COM. ARB. 209 (1991). As of this writing, no English translations of the proposed Hungarian law are available.

43. UNCITRAL Model Law, *supra* note 40, art. 7(2); LICA, *supra* note 39, art. 7(2).

44. UNCITRAL Model Law, *supra* note 40, art. 11(1); LICA, *supra* note 39, art. 11(2).

45. UNCITRAL Model Law, *supra* note 40, art. 16; LICA, *supra* note 39, art. 19.

46. UNCITRAL Model Law, *supra* note 40, art. 19; LICA, *supra* note 39, art. 24.

47. Stalev, *supra* note 20, Bulgarian P.R. - 3.

48. Law on Foreign Investment in Hungary, *supra* note 3.

profits as convertible currency.⁴⁹

In Poland, neither the 1990 foreign investment law nor the 1988 law it amended provide for dispute resolution.⁵⁰ Similarly, the 1991 Romanian investment law also lacks a dispute resolution provision.⁵¹ The absence of direct regulation of arbitration in the investment context does not limit the parties' opportunity to provide for arbitration in their investment agreements.⁵² Conversely, there is no means for parties to obtain arbitration if they do not include an arbitration clause in their contract. The attorney should ensure that any agreement is in writing and that its terms are clearly delineated.

The Czechoslovakian Enterprise with Foreign Property Participation Act of 1990 (Joint Venture Law) has no dispute resolution provision.⁵³ Still other aspects of C.S.F.R. law indicate an intention to allow, and perhaps even encourage, arbitration in the international commercial context. Article 47 of the Act on Economic Relations with Foreign Countries (Act on Economic Relations) states that the purpose of the Arbitration Court of the Czechoslovak Chamber of Commerce and Industry is to act as an independent body for the resolution of disputes arising from international trade.⁵⁴ The law makes no further reference to dispute resolution, but parties may at least provide for institutional arbitration before that body. As the Act on Economic Relations applies to a broader category of trade relations, its provisions on arbitration should apply to joint venture law as well.

Article 44 of the 1988 Act on Foreign Investment in Hungary states:

Legal disputes of associations with foreign participation shall be settled by a domestic or foreign ordinary court or by arbitration tribunal provided the latter was stipulated in writing as the place of dispute settle-

49. See, e.g., James C. Conner, *Recent Developments in Eastern European Laws on Investments*, 4 ICSID REV.—FOREIGN INVESTMENT L.J. 241, 249 (1989).

50. Law on Companies with Foreign Participation, *supra* note 7; Law on Economic Activity with the Participation of Foreign Parties, *supra* note 7. For a discussion of the substantive attributes of the 1991 law, see Pawel Mazur, *Poland: New Foreign Investment Law*, 19 INT'L BUS. LAW. 460 (1991).

51. Law Concerning the Status of Foreign Investments, *supra* note 8. See also Steven M. Glick, *Romania's Foreign Investment Law*, 19 INT'L BUS. LAW. 295 (1991); Campbell M. Steedman, *Recent Developments in Relation to Investment and Economic Restructuring in Romania*, 20 INT'L BUS. LAW. 20 (1992) (consideration of the general provision and incentives of the law.)

52. See Zbigniew M. Slupinski, *The New Polish Joint Venture Law*, 3 TRANSNAT'L L. 1, 35-37 (1990).

53. Enterprise with Foreign Property Participation Act, *supra* note 5. See also David C. Haas and Sarka Foltynova, *Foreign Investment in Czechoslovakia I—Recent Amendments to the Joint Venture Act*, 19 INT'L BUS. LAW. 21 (1991) (commentary on the substance of the amendments).

54. Act on Economic Relations with Foreign Countries, Apr. 19, 1990, art. 47 (C.S.F.R.), translated in 1 CEELM, *supra* note 3 (Rel. 1, June 1990).

ment by the founders or members of the Association.⁵⁵

This provision makes clear that the contracting parties may agree to arbitrate, but that if they do not include the agreement in the investment contract, the parties will have to go to court to resolve their dispute. The article does not explicitly allow the parties to specify the location and rules of the arbitration, although the Hungarian Chamber of Commerce's negotiation of model arbitration clauses for foreign investment in Hungary indicates a governmental policy allowing arbitration in neutral countries.⁵⁶

The Bulgarian 1991 Law on Foreign Investments does not have a specific arbitration provision. Still, Article 12 specifies that if a Bulgarian is a party to a labor dispute in a joint venture, the dispute shall be resolved by the Bulgarian courts, but if a foreigner is also a party, the dispute shall be resolved as provided by the labor contract.⁵⁷ This clause implies that at least labor contracts may contain a mediation or arbitration clause. Additionally, the prior Law on Economic Activity was amended in 1989 by the new arbitration act to allow for arbitration of disputes between foreigners and Bulgarian firms or individuals if the parties agree.⁵⁸

Yugoslavia has accepted arbitration as a means of international dispute resolution since 1978, when the joint venture law allowed arbitration either in Belgrade or before a foreign tribunal.⁵⁹ In 1989, Yugoslavia enacted a Law on Foreign Investments which has two dispute resolution provisions. Under this law, a dispute relating to an investment agreement will be resolved by a domestic court unless the parties provide for arbitration, either within Yugoslavia or elsewhere, in the investment agreement.⁶⁰ If the dispute relates to a concession agreement, it will be resolved by a domestic court unless the agreement provides for resolution under the Convention on the Settlement of Investment Disputes Between a State and Nationals of Other States (ICSID Convention) or makes other arrangements for arbitration.⁶¹ The law does not define "concession agreement," and it would have been

55. Law on Foreign Investment in Hungary, *supra* note 3, art. 44.

56. AAA-Hung. Memorandum of Agreement, *supra* note 15.

57. Law on Foreign Investment, *supra* note 6, art. 12.

Two detailed comparative studies of the relevant foreign investment laws have been recently completed. Laurie M. Brank, *Perestroika in Eastern Europe: Four New Joint Venture Laws in 1989*, 21 LAW & POL'Y INT'L BUS. 1 (1989); Conner, *supra* note 49.

58. Law on Economic Activity, *supra* note 6, Additional Stipulations, § 3(2).

59. Law on Investment of Resources of Foreign Persons in Domestic (Yugoslav) Organizations of Associated Labor, art. 52, SLUŽBENI LIST No. 18/1978, item 312, translated in 18 I.L.M. 230.

60. Law on Foreign Investments, *supra* note 4, art. 27.

61. *Id.*

much simpler to have a single clause discussing arbitration. The two provisions overlap to such an extent that the second adds nothing to the first. The second section does state a preference for ICSID arbitration, which this Note explains may be beneficial to the Western investor under any circumstances.⁶²

Article 22 of the Estonian Foreign Investment Law provides that disputes between foreign investors and Estonian citizens should be resolved before the Estonian courts or before a referee court selected by the parties.⁶³ The referee court apparently functions in the same manner as an arbitration panel.⁶⁴

The Law on Foreign Investments in the Republic of Lithuania takes an interesting approach to facilitating arbitration of disputes between nationals and foreign investors. Instead of simply allowing the parties to negotiate a dispute resolution provision, Article 14.10 requires that all investment contracts include a clause outlining the procedure for settling disputes.⁶⁵ Western investors should consider this requirement a blessing rather than a burden because it eliminates the hurdle of negotiating for the inclusion of a dispute resolution clause. Other East European nations creating or amending their foreign investment laws should consider adopting a similar statute.

C. *Choice of Law Governing the Substance of the Arbitration*

The Western investor should be concerned about the law governing resolution of the dispute. Substantial consideration of East European choice of law provisions is beyond the scope of this Note, but the discussion below provides a guide to some important issues. All of the legal systems discussed here allow the parties to an ad hoc arbitration to specify the governing law in advance. In the absence of such a choice, the arbitral panel must apply the correct law based on the choice of law provisions of the forum or of public international law.⁶⁶ The practitioner should consult local law regarding review of arbitral awards to determine if the panel's failure to apply the correct substantive law constitutes sufficient grounds to deny enforcement of the award.

62. See *infra* text accompanying notes 114-25.

63. Foreign Investment Law, *supra* note 9, art. 22.

64. *Id.*

65. Law on Foreign Investments in the Republic of Lithuania, *supra* note 9, art. 14.10.

66. LICA, *supra* note 39, art. 38; Act Relating to Arbitration in International Trade and Enforcement of Awards, *supra* note 34, § 14(2); Szurski & Wiśniewski, *supra* note 24, Polish People's Republic - 18; Polish Code of Civil Procedure, *supra* note 25, art. 356; Goldštajn, *supra* note 25, Yugoslavia - 14-15; Hanák, *supra* note 20, Czechoslovakia - 29; Popescu, *supra* note 24, Romania - 13-14.

As a practical matter, the parties' choice might be limited by the provisions of the host State's investment law. In all the States discussed above, various foreign investment laws provide that the law of that State governs formation and operation of the enterprise.⁶⁷ The choice of law provisions are modified slightly by other articles in certain investment laws. In Romania and Hungary, the investment law applies so long as it is consistent with any foreign investment treaties to which the nations are parties.⁶⁸ Similarly, the C.S.F.R. law may be explicitly overruled by treaty.⁶⁹ Yugoslavia's Law on Foreign Investment specifies that if the law is amended after the investment agreement is signed, the law most favorable to the investor will apply.⁷⁰

D. *Enforcement of Arbitral Awards*

In the event that a dispute arises and is resolved in favor of the investing party through arbitration in a neutral country, the investor must be able to enforce the award. Otherwise, all potential benefits from the transaction and the arbitration agreement will be lost. The C.S.F.R., Romania, Bulgaria, Yugoslavia, Poland, and Hungary are all signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁷¹ The New York Convention commits its signatories to enforce written arbitration agreements⁷² and, more significantly, to enforce arbitral awards rendered in another country unless the award is subject to one of the enumerated exceptions.⁷³ Most of the permissible justifications

67. Law on Economic Activity, *supra* note 6, Additional Stipulations § 3(1) (Bulg.); Enterprise with Foreign Property Participation Act, *supra* note 5, art. 3 (C.S.F.R.); Law on Companies with Foreign Participation, *supra* note 7, art. 1(3) (Pol.); Law Concerning the Status of Foreign Investments of March 29, 1991, *supra* note 8, arts. 28, 30, 34 (Rom.); Law on Foreign Investments, *supra* note 4, art. 6 (Yugo.). See also Decree-Law Concerning the Authorization and Operation of Representative Offices in Romania, Apr. 25, 1991, MONITORUL OFICIAL No. 54/1990, art. 8, translated in 3 CEELM, *supra* note 3 (Rel. 4, May 1991).

The Hungarian Foreign Investment Law has no provisions relating to the law governing operations of businesses which have foreign capital but does state that Hungarian law governs the formation of such enterprises. Law on Foreign Investment in Hungary, *supra* note 3, art. 3.

68. Law Concerning the Status of Foreign Investments, *supra* note 8, art. 34; Law on Foreign Investment in Hungary, *supra* note 3, art. 6.

69. Enterprise with Foreign Property Participation Act, *supra* note 5, art. 27.

70. Law on Foreign Investments, *supra* note 4, art. 7.

71. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 (entered into force June 5, 1959) [hereinafter New York Convention].

72. *Id.* art. II.

73. *Id.* arts. III, V.

Article V of the New York Convention provides,

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable

for denying enforcement of an arbitral award focus on procedural shortcomings in the arbitration itself. The most important exception is Article 5(2)(b), which allows a signatory nation to refuse to enforce an award which is contrary to its public policy.⁷⁴ The public policy exception is critical because it is subjective—the national court will dictate the enforcing nation's public policy. An investor's attorney must carefully consider whether any potential remedies to a dispute may be held contrary to the public policy of any possible enforcing State and, to the extent possible, specifically provide in the arbitration agreement that those remedies may not be part of the arbitral award. In spite of these exceptions, the adoption of the New York Convention by all of these nations provides the investor substantial power to recover against an Eastern European entity's property in the event that the investor is involved in an arbitration and is awarded damages.

Article 1(3) of the New York Convention proposes two reservations which signatories could make to their ratifications and still maintain the spirit of the Convention. Signatories may limit enforcement of arbitral awards to cases in which the other nations involved are also Contracting States. Further, a Contracting State may refuse to enforce a foreign arbitral award in a dispute which is not "commercial" under the law of that State.⁷⁵ Bulgaria and the C.S.F.R. have adopted the Contracting State reservation, but may extend application of the Convention to a nonsignatory State which recognizes their arbitral

to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

74. *Id.*, art. V, paras. 1,2.

75. *Id.* art. I, para. 3.

awards by means other than the Convention.⁷⁶ Hungary and Poland signed the Convention with both of the Article 1(3) reservations, changing the text only enough to state the nation's name.⁷⁷ Romania⁷⁸ and Yugoslavia⁷⁹ require that a dispute be commercial and that the foreign party be from a signatory State or a State which treats their awards with reciprocity. In light of these reservations, the practitioner should ensure that the State in which the arbitration occurs is also a Contracting State to the New York Convention.⁸⁰

Despite its importance, the New York Convention has led to very little litigation in Eastern Europe. In 1984, the Romanian Supreme Court held that the Municipal Court of Bucharest had jurisdiction to enforce an arbitral award granted in London to a Panamanian company against a Romanian company.⁸¹ In 1985, Romanian courts enforced another English award, this time to the benefit of a Romanian company against a Lebanese company.⁸² No evidence exists that the courts of any of the other East European nations would decide enforcement cases in a different manner, though, as noted above, the attorney should be aware of the possibility that an arbitral award will not be enforced on public policy grounds.

No domestic legislation specifically implements the New York Convention in most East European States, though all of them except Hungary have domestic legislation which effectively enforces the Convention.⁸³ The Romanian government did propound a decree "ac-

76. GIORGIO GAJA, *INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION VI.4* (Kenneth R. Simmonds ed., 1979).

77. New York Convention, *supra* note 71, art. VI.5. The United States has adopted the standard reservations as well. *Id.* art. VI.6.

78. *Id.* art. VI.6.

79. Goldštajn, *supra* note 24, at Yugoslavia - 20.

80. For a discussion of other considerations involved in the selection of a neutral site for arbitration, see AMERICAN ARBITRATION ASSOCIATION, *SURVEY OF INTERNATIONAL ARBITRATION SITES* (1984).

81. Judgment of June 3, 1984, Supreme Court of Romania, No. 1560/1984, 14 Y.B. COM. ARB. 691 (1989).

82. Judgment of Feb. 16, 1985, Supreme Court of Romania, No. 332/1985, 14 Y.B. COM. ARB. 689 (1989).

83. This absence of enforcing legislation contrasts with existing American law. Following its ratification of the New York Convention in 1970, the United States amended the Federal Arbitration Act to comply with the Convention. United States Arbitration Act, 9 U.S.C. §§ 201 - 08 (1989).

Scholastic controversy continues over the need for these nations to enact domestic legislation to enforce the convention. Professor Jackson suggests that democratic governments, in general, should not prefer direct domestic application of treaties to legislative enactment of domestic enforcing legislation because to do so undemocratically removes power from the legislature and places too much trust in international treaty negotiations. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 313, 323-25 (1992).

cepting" the Convention upon its signing the document.⁸⁴ Article 375 of the Romanian Code of Civil Procedure, however, requires that a domestic court "invite and hear" all parties to the dispute before it orders enforcement of the award in Romania.⁸⁵ This is the only provision of the arbitration laws discussed in this Note directly in conflict with the New York Convention. Requiring the parties to appear in Romania places a more onerous condition on foreign arbitral awards than on domestic ones, contravening Article 3 of the Convention.⁸⁶ The Code of Civil Procedure does not have an "overridden by treaty" provision as found in the Law Concerning the Status of Foreign Investments,⁸⁷ so the legal status of this provision will probably remain unclear until challenged. To comply with the New York Convention, Article 375 must be amended.

The Romanian Code of Civil Procedure also requires the award to be consistent with Romanian public policy and the national governance of the other parties must also be willing to enforce the award for the court to enforce it.⁸⁸ The Bulgarian Law on International Commercial Arbitration provides that foreign awards will be enforced in a manner consistent with any treaties to which Bulgaria is a party or if reciprocity of enforcement is established.⁸⁹ The award will not be enforced if the arbitration was not conducted in conformity with certain equitable procedures or if the award is contrary to Bulgarian public policy.⁹⁰

In the C.S.F.R., Articles 29 through 33 of the 1963 Arbitration Act provide for enforcement of foreign arbitral awards if the country where the award was rendered grants the C.S.F.R. reciprocity and the award is not contrary to public policy, *res judicata*, or otherwise voidable (because one party had bribed the arbitrators, for example).⁹¹ Articles 97 through 100 of the Act on Settlement of Conflicts Between Yugoslav Laws and Provisions of Other Countries Concerning Certain Matters set up means for enforcement of awards from other nations.⁹² Article 99 lists eleven reasons why a foreign arbitral award may not be

84. *National Legislation: Romania*, in GAJA, *supra* note 76, at IV.7.1.

85. Romanian Code of Civil Procedure, *supra* note 29, art. 375.

86. New York Convention, *supra* note 71, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40.

87. Law Concerning the Status of Foreign Investments, *supra* note 8, art. 34.

88. Romanian Code of Civil Procedure, *supra* note 29, art. 375.

Such a public policy exception is consistent with the New York Convention. New York Convention, *supra* note 71, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 40.

89. LICA, *supra* note 39, art. 49(2).

90. *Id.* arts. 47, 50.

91. Act Relating to Arbitration in International Trade and to Enforcement of Awards, *supra* note 34, §§ 29 - 33, Czechoslovakia: Annex I - 6-7.

92. Act on the Settlement of Conflicts Between Yugoslav Laws and Provisions of Other

enforced, including the absence of valid, written arbitration agreement, lack of reciprocity, or prohibition under Yugoslavian arbitration law on the subject matter of the dispute. The provision forbids the domestic court from enforcing an award "contrary to the foundations of the social order determined by the Socialist Federal Republic of Yugoslavia."⁹³ All of these limitations on enforcement of foreign arbitral awards are consistent with the New York Convention.

II. TREATIES GOVERNING INVESTMENT AND COMMERCIAL RELATIONS

A. *Bilateral Treaties*

East European nations have done more than liberalize their foreign investment laws to attract Western investors. Many States have eagerly negotiated bilateral investment treaties (BITs) with Western economic powers.⁹⁴ The goal of the parties entering into a BIT is to obtain favorable terms of trade in capital and to secure protection of capital invested in the foreign country. Poland has enacted two BITs with the United States⁹⁵ and one with Germany⁹⁶ to enhance trade

Countries Concerning Specific Matters, Jan. 1, 1983, *translated in* 3 INT'L HANDBOOK ON COM. ARB., *supra* note 3, Yugoslavia: Annex II - 3-4 (Supp. 1985).

93. *Id.*

94. During the period from March, 1974 through May, 1983, Yugoslavia and Romania were active in concluding investment treaties with Western European and African nations. Many of the treaty texts may be found reprinted in INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, INVESTMENT LAWS OF THE WORLD: INVESTMENT PROMOTION AND PROTECTION TREATIES (1990) [hereinafter WORLD INVESTMENT TREATIES].

More recently, though still prior to the general liberalization of foreign investment laws, the United Kingdom negotiated investment treaties with Hungary and Poland. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments, Mar. 9, 1987, U.K. Treaty Service No. 3 (1988), CMD 281, *reprinted in* 3 WORLD INVESTMENT TREATIES booklet 1987-a, 7 (1988); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Reciprocal Protection of Investments, Dec. 8, 1987, U.K. Treaty Service No. 26 (1988), CMD 365, *reprinted in* 3 WORLD INVESTMENT TREATIES booklet 1987-a, 37 (1988). The Netherlands entered into similar agreements with Hungary and Bulgaria. Agreement between the Kingdom of the Netherlands and the Hungarian People's Republic for the Encouragement and Reciprocal Protection of Investments, Sept. 2, 1987, TRACTATEN BLAD No. 172 (1987), *translated in* 3 WORLD INVESTMENT TREATIES booklet 1987-b, 3 (1990); Agreement between the Kingdom of the Netherlands and the People's Republic of Bulgaria on Mutual Encouragement and Protection of Investments, Mar. 8, 1988, TRACTATEN BLAD No. 50 (1988), *translated in* 3 WORLD INVESTMENT TREATIES booklet 1988-a, 1 (1990)). Bulgaria also contracted with Finland. Agreement between the Government of the Republic of Finland and the Government of the People's Republic of Bulgaria on Mutual Promotion and Protection of Investments, *translated in* 3 WORLD INVESTMENT TREATIES booklet 1984-b, 1 (1990). Each of these treaties contains at least one provision providing for arbitration of investment disputes.

For more discussion of the Eastern European states' bilateral investment treaties, see Istvan Pogany, *The Regulation of Foreign Investment in Hungary*, 4 ICSID REV.—FOREIGN INVESTMENT L.J. 39, 40-52 (1989).

95. Investment Guaranty Agreement, Oct. 13, 1989, U.S.-Pol., 28 I.L.M. 1393 (1989);

relationships. The C.S.F.R. has also negotiated a treaty on trade with the United States.⁹⁷ All of these treaties provide for arbitration.

Article 9 of the Treaty Concerning Business and Economic Relations of March 21, 1990 between the United States and Poland provides for resolution of disputes between the investor and the State where the investment was made.⁹⁸ The article applies to the interpretation and/or application for the investment agreement between the parties, State authorization of investment, and any alleged breach of any investment treaty by either party. The first step of the mandated process requires consultation and/or mediation. The dispute settlement procedures in the investment agreement are binding, so the practitioner must take care when drafting the dispute resolution clause. If the agreement lacks such a clause, the parties to the dispute may agree to arbitrate after sixty days of negotiation. Under the treaty, both governments involved consent to arbitrate any issue under UNCITRAL or ICSID rules. The provision applies whether the investment is in the United States or in Poland.⁹⁹

The Treaty Concerning Business and Economic Relations has an additional article dealing with resolution of disputes between the governments of Poland and the United States.¹⁰⁰ It is similar to the dispute resolution provision of the Investment Guaranty Agreement of October 13, 1989, which entered into force February 21, 1990.¹⁰¹ The provision resembles a standard arbitration clause. It states that the panel will consist of three arbitrators with each party choosing one and the two arbitrators selecting a chair from a neutral State. The parties must undergo some period of negotiation before submitting the dispute to arbitration. Both parties must pay the expenses of the proceeding. UNCITRAL rules apply unless the parties specify otherwise. The panel's decision will be based on the treaty and public international law.¹⁰²

Treaty Concerning Business and Economic Relations, Mar. 21, 1990, U.S.-Pol., S. TREATY DOC. No. 18, 101 Cong., 2d Sess. (1990).

96. Treaty Concerning the Promotion and Reciprocal Protection of Investments, Nov. 10, 1989, Ger.-Pol., 29 I.L.M. 333 (1990).

97. Agreement on Trade Relations, April 12, 1990, U.S.-C.S.F.R., 29 I.L.M. 902 (1990).

98. Treaty Concerning Business and Economic Relations, *supra* note 95, art. 9.

99. *Id.*

100. *Id.* art. 10. The dispute resolution provisions of articles 9 and 10 do not apply to any dispute which arises under an agreement with the United States Export-Import Bank or any other official credit arrangement. *Id.* art. 9.

101. Investment Guaranty Agreement, *supra* note 95, art. 6.

102. *Id.*; Treaty Concerning Business and Economic Relations, *supra* note 95, art. 10.

Articles 10 and 11 of the treaty between Poland and Germany deal with arbitration under the treaty, but do not specify the place or rules of the arbitration. Treaty Concerning the Promotion and Reciprocal Protection of Investments, *supra* note 96, arts. 10 - 11.

The United States and the C.S.F.R. are bound by the Agreement on Trade Relations of April 12, 1990, which entered into force on November 17, 1990. This agreement discusses trade relations generally rather than focusing exclusively on investment. The clause relating to dispute resolution does not obligate the parties to take any specific action. It does, however, encourage parties who engage in trade between the two nations to agree to arbitrate disputes. It also requires the enforcement of any award granted in commercial arbitration between citizens of the C.S.F.R. and the United States.¹⁰³ In drafting an arbitration agreement the parties may provide for arbitration under any recognized rules, but the parties must specify an appointing authority to use UNCITRAL rules.¹⁰⁴ The parties should contract for arbitration in a neutral country which is also a party to the New York Convention.¹⁰⁵

In addition to BITs, various East European chambers of commerce have attempted to provide a "safety net" for U.S. investors by facilitating commercial arbitration in conjunction with the AAA. Though it does not have authority to negotiate treaties per se, the AAA has acted aggressively to encourage the inclusion of arbitration agreements in commercial contracts between United States and Eastern European citizens. The AAA and the relevant chambers of commerce have negotiated agreements proposing an "optional clause" for inclusion in such contracts. The "optional clause" is simple and covers the issues attorneys should be most concerned about in drafting arbitration agreements under any circumstances. The first of these agreements was finalized in 1977 with the Soviet Union.¹⁰⁶ The AAA and Soviet Chamber of Commerce agreed to advise potential investors to include in the relevant contract the "optional clause," which they negotiated, for dealing with disputes arising under the contract. The proposed

103. Agreement on Trade Relations, *supra* note 97, art. 14, paras. 2, 6.

104. *Id.* art. 14(3).

UNCITRAL is not associated with any international court of arbitration which could step in to appoint arbiters if the parties cannot agree on panel membership. Whenever drafting an arbitration clause that provides for arbitration under the UNCITRAL rules, the attorney should also specify an appointing authority, such as the American Arbitration Association or the International Court of Arbitration of the International Chamber of Commerce. For the tribunal selection procedures of these appointing authorities, see AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION, rules 13-16 (1984) and ICC Rules of Conciliation and Arbitration, art. 2 (1988), *reprinted in* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, app. II-3 (1990), respectively.

105. Agreement on Trade Relations, *supra* note 95, art. 14(4).

The United States has concluded a treaty with an identical dispute resolution provision with Mongolia. Agreement on Trade Relations, U.S. - Mong., 30 I.L.M. 515, art. 12 (1991).

106. Optional Clause for Use in Contracts in U.S.A.-U.S.S.R. Trade — 1977, *reprinted in* 3 Y.B. COM. ARB. 301 (1978).

clause provided for arbitration in Stockholm using UNCITRAL rules with the Stockholm Chamber of Commerce acting as the appointing authority.¹⁰⁷

The AAA negotiated similar memoranda of agreement with Hungary in 1985,¹⁰⁸ Poland in 1988,¹⁰⁹ and the C.S.F.R. in 1989.¹¹⁰ The Hungarian optional clause allows the parties to provide for arbitration in Vienna using UNCITRAL rules.¹¹¹ Both the Polish and Czech optional clauses permit parties to arbitrate either in Austria or wherever else they designate under the UNCITRAL rules.¹¹² The Austrian arbitration authority was involved in negotiation of the agreements with the Polish and Czech chambers of commerce.¹¹³ Though these agreements do not have the force of law, the memoranda themselves and the related optional clauses may serve as a good model for the practitioner who has little experience in drafting arbitration clauses.

B. *Convention on the Settlement of Investment Disputes*

While the foregoing discussion focuses on bilateral arrangements, this section considers the Convention on the Settlement of Investment Disputes between a State and Nationals of Other States (ICSID Convention).¹¹⁴ The ICSID Convention is a multilateral treaty which created the International Centre for the Settlement of Investment Disputes (ICSID) to arbitrate and conciliate international investment disputes.¹¹⁵ The United States and most Western European nations have either signed or ratified the treaty. The C.S.F.R., Romania, Poland, and Yugoslavia are also parties, but none has yet been involved in any ICSID arbitration.¹¹⁶

The ICSID has jurisdiction over "legal dispute[s] arising directly out of an investment, breach of a Contracting State [or its subdivision or agent] and a national of another Contracting State, which the par-

107. *Id.* arts. 2, 3, 7.

108. AAA-Hung., Memorandum of Agreement, *supra* note 15.

109. AAA-Pol.-Aus. Tripartite Agreement, *supra* note 16.

110. AAA-C.S.F.R.-Aus. Tripartite Agreement, *supra* note 17.

111. AAA-Hung., Memorandum of Agreement, *supra* note 15.

112. AAA-Pol.-Aus. Tripartite Agreement, *supra* note 16, § 8; AAA-C.S.F.R.-Aus. Tripartite Agreement, *supra* note 17, § 8.

113. *Id.*

114. ICSID Convention, *supra* note 14.

115. *Id.* art. 1.

116. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, 1990 ANNUAL REPORT 14-15 (1990).

For an example of the work done by the ICSID, see Tribunal: Final Award in Asian Agricultural Products, LTD. v. Republic of Sri Lanka, ICSID (W. Bank) case no. ARB/87/3, *reprinted in* 30 I.L.M. 577 (1991).

ties to the dispute consent in writing to submit to the Centre.”¹¹⁷ The tribunal impaneled to resolve the dispute decides its own competence, including any objections to the validity of the arbitration clause.¹¹⁸ The tribunal will apply the parties’ choice of law.¹¹⁹ The parties may agree on rules of arbitration, although ICSID rules act as a default.¹²⁰

The most important provision from the standpoint of the U.S. investor is that the arbitration will be held in Washington, D.C., the ICSID’s seat, unless the parties consent to arbitration at the seat of any other permanent court of arbitration.¹²¹ The parties may locate the arbitration at a site which is not the seat of a court of arbitration only with the approval of the ICSID Commission.¹²² The fact that Washington is the ICSID’s seat gives the U.S. investor a strong position from which to negotiate for arbitration at his or her most desirable location.

Even if the investor cannot bargain for proceedings in the United States, ICSID dispute resolution has the advantage of specialized and expert arbitrators. Additionally, the terms of the ICSID Convention bind the parties to enforce the arbitral award regardless of the location of the arbitration.¹²³ The Convention also provides parties considerable control over the procedure of the arbitration, enhancing the need for careful drafting of dispute resolution clauses.¹²⁴ These institutional advantages outweigh the costs involved in resolution before the ICSID.¹²⁵ This neutral, experienced body could be extremely useful in resolving disputes arising from the development of the East European markets.

CONCLUSION

A carefully drafted arbitration agreement will be essential to the resolution of disputes between U.S. investors and their East European partners or the States in which they invest. In drafting dispute resolution clauses, the attorney should investigate both the arbitration and foreign investment laws of the country hosting the investment. Issues

117. ICSID Convention, *supra* note 13, art. 25.

118. *Id.* art. 41.

119. *Id.* art. 42.

120. *Id.* art. 44.

121. *Id.* arts. 62-63.

122. *Id.* art. 63.

123. *Id.* arts. 53-54.

124. Emmanuel Galliard, *Some Notes on the Drafting of ICSID Arbitration Clauses*, 3 ICSID REV.—FOREIGN L.J. 136, 143-46 (1988).

125. For a discussion of the administrative costs involved, see *supra* note 13.

to consider when investigating any nation's arbitration law should include the ad hoc and institutional arbitration available in the State, the procedural issues which will govern the conduct of the arbitration, any limitations on the parties' ability to select the law which governs the substance of the arbitration and the country's procedure for enforcement of arbitral awards. On the issue of enforcement, the practitioner must be particularly aware of any public policy considerations of the host State which might limit the availability of certain types of remedies in the arbitral award. The practitioner must also examine any investment laws or treaties which may expand the parties' ability to arbitrate in neutral countries or which may require inclusion of an arbitration agreement in the contract establishing the investment. This Note has provided a summary of the law on these issues in Bulgaria, the C.S.F.R., Hungary, Poland, Romania, and Yugoslavia.

Most arbitration regimes, both ad hoc and institutional, provide the parties with a great deal of flexibility in arranging arbitration procedures. The parties to the contract should address any problems of dispute resolution specifically in the arbitration agreement. Institutional arbitration regimes will often provide the location of the arbitration, but will generally allow the parties to deviate from the default rules. The investor may avoid rules detrimental to the investor's position by selecting another system of rules in the agreement or by choosing another institution to guide the arbitration. The ICSID is an institution that follows procedures the Western investor may find beneficial, including its default location in the United States and its automatic enforcement mechanism. Drafting an arbitration agreement for a large transaction is a task potentially fraught with difficulty, but the lawyer may save the client time and effort by carefully considering the possibility of ICSID arbitration for dispute resolution under the investment or joint venture agreement.